No. 95-860

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BARBARA SMILEY,

Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

AMICI CURIAE BRIEF OF THE AMERICAN BANKERS ASSOCIATION, MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This amici curiae brief is filed in support of Citibank (South Dakota), N.A. by the American Bankers Association (the "ABA"), MasterCard International Incorporated ("MasterCard") and VISA U.S.A. Inc. ("VISA"). The ABA,

MasterCard and VISA (collectively, the "Amici") agree with both Petitioner and Respondent that a writ of certiorari should be granted in *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995) (*"Smiley"*). Petitioner and Respondent each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

The ABA is the largest national trade association of the commercial banking industry in the United States, representing banks in all fifty states and the District of Columbia that hold approximately ninety percent of the domestic assets of all American commercial banks. VISA and MasterCard are associations of financial institutions that license service marks for use in connection with credit cards, debit cards, automated teller machines and related financial services. As of year-end 1994, VISA and MasterCard had approximately 17,000 and 13,600 depository institution members, respectively, that collectively have issued a credit card to most adults in the United States. *The Nilson Report*, Issue No. 591 (Mar. 1995) at 8.

Amici's members that are national banks are vitally interested in the proper interpretation of 12 U.S.C. § 85 ("Section 85"), which governs the interest that may be charged on loans made by national banks. Amici's members that are state-chartered banks, federally- or state-chartered savings associations, or federally- or state-chartered credit unions, also are particularly interested in the interpretation of Section 85 because most of these federally-insured depository institutions have authority under Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (1980), to charge the same interest that national banks are authorized to charge under Section 85.

See, e.g., Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 830 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (Section 521) (*"Greenwood Trust"*); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (Section 522).

The discussion below focuses on the importance of this case for the credit card industry because the *Smiley* case deals with credit card loans. However, Section 85 and Sections 521 through 523 of DIDA are not limited to credit card programs; they apply to all types of retail and commercial loans. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) (tax refund anticipation loans). Thus, the principles at issue in this case are critically important for virtually every lending function of the banking industry.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve an irreconcilable conflict between the California and Colorado Supreme Courts and the United States Court of Appeals for the First Circuit on the one hand, and the New Jersey Supreme Court on the other hand, on the important federal question of whether late fees are interest for purposes of Section 85. Immediate resolution of this issue is urgently needed to reestablish the uniform national rule that the federal government established for the national banking system, but that was not followed by the New Jersey Supreme Court.

Prompt review by this Court is imperative because uncertainty regarding the permissibility of late charges assessed with respect to billions of dollars of credit will adversely affect both the ability of borrowers to obtain credit and the national economy. Resolution of this issue also

significantly affects the extraordinary potential liability of Amici's members that have collected late fees permitted by federal law, but not state law; liability that could affect the continued existence of many of Amici's members.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CALIFORNIA AND COLORADO SUPPEME COURTS AND THE FIRST CIRCUIT, AND THE NEW JERSEY SUPREME COURT.

Review on a writ of certiorari is proper in this case because a state court of last resort has decided a federal question in a way that directly conflicts with the decisions of two other state courts of last resort and a federal Court of Appeals. *See* Sup. Ct. R. 10(b). The California Supreme Court in *Smiley*, and the Colorado Supreme Court in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Sup. Ct. Nov. 20, 1995) ("*Copeland*"), each held that late fees charged by a national bank on its credit card loans are interest for purposes of Section 85. *Smiley* and *Copeland* both follow the decision of the United States Court of Appeals for the First Circuit in *Greenwood Trust*. Although *Greenwood Trust* involved Section 521 of DIDA, the First Circuit held that late fees are interest charges under that statute because late fees are interest under Section 85. 971 F.2d at 825.

The *Smiley*, *Copeland* and *Greenwood Trust* decisions persuasively and correctly explain why Section 85 applies to late fees. Nonetheless, the New Jersey Supreme Court held in *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Sup. Ct. Nov. 28, 1995) ("*Sherman*"), that late fees on credit card loans are not covered by Section 85 because that statute applies only to

periodic percentage rate charges assessed on outstanding loan balances.[1]

The conflict between the decisions of the California and Colorado Supreme Courts and the First Circuit on the one hand, and the New Jersey Supreme Court on the other, creates dangerous uncertainty for national banks and their customers throughout the United States. Without resolution of the conflict by this Court, credit card late fees charged by a national bank to borrowers residing in California or Colorado (as well as states included in the First Circuit) will be covered by Section 85, while the same fees charged by the same national bank to borrowers residing in New Jersey will not. Thus, the scope of federal interest authority under Section 85 will vary depending on the state in which a national bank's borrowers reside. Such a result is directly contrary to this Court's ruling in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that Section 85 applies on the basis of the national bank's location and not the borrower's residence.

Not only does the New Jersey Supreme Court's interpretation of Section 85 conflict with decisions from the California and Colorado Supreme Courts and the First Circuit, it also conflicts with the interpretation of the federal agency charged with interpreting and enforcing the National Bank Act. The Office of the Comptroller of the Currency (the "OCC") has stated repeatedly that credit card late fees are covered by Section 85. *See, e.g.*, Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 (reaffirming and restating the OCC's long-time position). As part of the OCC's general revisions to its interpretive rules, the OCC has

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[1] The New Jersey Supreme Court also held that late fees are not interest under Section 521 of DIDA in *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Sup. Ct. Nov. 28, 1995).

proposed to codify its position that late fees are "interest." *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (Mar. 3, 1995). The OCC made its position clear to the California, Colorado, and New Jersey Supreme Courts in amicus briefs filed in the *Smiley, Copeland,* and *Sherman* cases. Yet the New Jersey Supreme Court specifically refused to grant the OCC's interpretation the deference called for by this Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995).

The resolution by this Court of the central and fundamental federal question of whether Section 85 applies to late fees is urgently needed now. There is no dispute that the late fees assessed by national banks in numerous pending lawsuits are permissible if Section 85 applies. A conclusive answer from this Court that late fees are interest thus will resolve those lawsuits, and avoid unnecessary, repetitive, costly, and disruptive additional litigation. Immediate resolution of the conflict on this issue also is essential to enable national banks to know what law applies to the late fees they charge on the billions of dollars of credit now being extended to borrowers, and to ensure that the national banking system functions effectively and efficiently.

II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 IS OF FUNDAMENTAL IMPORTANCE.

Financial institutions in the United States regularly extend enormous amounts of credit on credit card accounts. The outstanding balances on VISA and MasterCard credit cards issued in the United States alone exceeded $275 billion at mid-year 1995. *The Nilson Report,* Issue No. 603 (Sept. 1995) at 7. Amici's members which extend the hundreds of billions of dollars of credit must be able to determine whether late fees are included in the federal interest authority

provided by Section 85, since late fees constitute a significant component of credit card pricing. Absent such guidance, banks cannot know whether their lending charges comply with applicable fee limitations. If they guess wrongly, they are exposed to tens, if not hundreds, of millions of dollars of liability for imposing excess fees.

The late fee itself is a very important price component of credit card loans. That fee facilitates the fair and efficient administration of credit card programs; it allows card issuers "to impose default costs on late payers, who are responsible for them, and to avoid shifting [such costs] to timely payers, who are not." *Smiley*, 11 Cal. 4th at 161. In addition, late fees constituted a majority of the estimated $2.1 billion in miscellaneous fees (namely, fees other than periodic finance charges, annual fees and cash advance fees) that were collected by bank card issuers in 1994. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

This issue already has generated a significant amount of complicated, time-consuming, and expensive litigation. Over forty-five class action lawsuits and state enforcement actions have been filed across the country since November 1991 challenging whether Section 85 (or Sections 521 through 523 of DIDA) applies to late fees on credit card loans. To date, such cases have been filed in Alabama, California, Colorado, Maine, Massachusetts, Minnesota, New Jersey, Pennsylvania, South Carolina, and Wisconsin. In many instances, the plaintiffs' theories of state law violations could result in recoveries of a multiple of the allegedly excessive late fees, or even forfeiture of all charges (including periodic finance charges). Prompt resolution of the scope of Section 85 is thus needed to protect national banks (federal instrumentalities) from potentially ruinous damages under state law.

The current uncertainty also presents a clear risk of substantial disruption to the nation's credit card payment systems, which are critical to the functioning of the nation's economy. At mid-year 1995, there were approximately 343.1 million VISA and MasterCard credit cards issued domestically, which accessed about 252.9 million accounts. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Annualizing data for the first six months of 1995, there will be approximately 5.5 billion transactions on VISA and MasterCard credit cards issued in the United States alone, for an aggregate volume of $490.5 billion. *Id.*

In reliance on existing case law and the OCC's interpretations, Amici's members have established pricing for their credit card accounts based upon the understanding that federal law controls the permissibility of late fees. If the courts do not follow the OCC's guidance on this point, the pricing structures of Amici's members will be at risk, leaving those institutions in a potentially precarious state which could threaten their existence. In addition, new interpretations of the applicable law that governs late fees will force Amici's members to engage in costly and time-consuming changes to existing account pricing strategies and systems for servicing their credit card accounts. The uncertainty and resulting dislocation are likely to impact significantly the availability of credit on bank cards nationwide.

CONCLUSION

For the reasons set forth above, Amici strongly urge the Court to grant the petition for certiorari in this case.

Respectfully submitted,

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